

CITY OF TIGARD, OREGON

ORDINANCE NO. 02-30

AN ORDINANCE GRANTING TO TIME WARNER TELECOM OF OREGON LLC A FRANCHISE TO CONDUCT A TELECOMMUNICATIONS BUSINESS IN THE CITY OF TIGARD, OREGON, INCLUDING THE RIGHT TO PLACE POLES, WIRES, AND OTHER APPLIANCES FOR TELECOMMUNICATION PURPOSES IN THE PUBLIC RIGHTS-OF-WAY; AND AUTHORIZING THE MAYOR TO SIGN THIS AGREEMENT.

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WHEREAS, The ten-year franchise for the communication facilities and services provided by Time Warner Telecom of Oregon LLC, described in the title of this ordinance is now before the City Council for approval. The Council believes that the franchise should be approved under the terms and conditions set forth in Exhibit A, attached hereto, and by this reference made a part hereof.

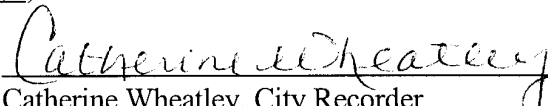
THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1. The terms and conditions of the attached franchise agreement, Exhibit A, are hereby approved and adopted as part of this ordinance as if specifically set forth.

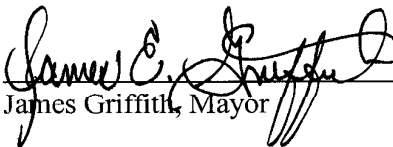
SECTION 2. The Mayor is authorized and directed to sign the attached agreement on behalf of the Council.

SECTION 3. The City Council determines that the fee imposed by this franchise is not a tax subject to the property tax limitations of Article XI, Section 11 (b) of the Oregon Constitution.

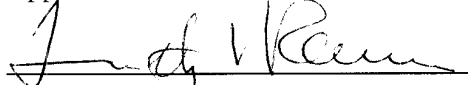
PASSED: By Unanimous vote of all Council members present after being read by number and title only, this 27<sup>th</sup> day of August, 2002.

  
Catherine Wheatley, City Recorder

APPROVED: This 27<sup>th</sup> day of August, 2002.

  
James Griffith, Mayor

Approved as to form:

  
City Attorney

8/27/02  
Date

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## **EXHIBIT "A"**

### **TELECOMMUNICATIONS FRANCHISE AGREEMENT**

A nonexclusive, ten (10) year franchise between the City of Tigard and Time Warner Telecom of Oregon LLC to conduct a telecommunication business within the City of Tigard.

**NOW, THEREFORE**, in consideration of the mutual promises and covenants hereinafter contained, the sufficiency of which is acknowledged, the parties hereto agree as follows:

#### **SECTION 1. GRANT AND ACCEPTANCE OF FRANCHISE**

The City of Tigard, OR (herein referred to as "City") grants to Time Warner Telecom of Oregon LLC (herein referred to as "Grantee"), subject to applicable City codes, ordinances, regulations, and the terms of this agreement, the privilege to use the rights of way of the City of Tigard for a telecommunications business for the purpose of furnishing telecommunications services as defined in State and Federal Law. This grant includes the right to erect, construct, place, replace, reconstruct, lay, maintain, and operate poles, wires, switching equipment, amplifying equipment, fixtures, facilities, appliances, structures and other devices including, but not limited to, electronic, optical and mechanical devices customarily associated with Grantee's function and purpose of serving as a telecommunications utility in, on, upon, above, beneath, within, along, across, under and over the City's rights of way.

This franchise is granted solely for the privilege of providing telecommunications services as defined by State and Federal Law. This franchise does not include the right to conduct the business of providing a "cable system" as defined in applicable law. Should the Grantee desire to provide a cable system within the City, it must comply with the City's regulations relating to cable communications in force at that time.

Grantee accepts the grant of the franchise and agrees to comply with Tigard Municipal Code Chapter 5.14, the resolution granting the franchise, and all other applicable laws, ordinances, and regulations.

#### **SECTION 2. FRANCHISE FEE**

Grantee shall pay an annual franchise fee in the amount of \$7,500 or the amount established under the following subsection, whichever is greater:

- a. Five percent (5%) of gross revenues generated within the City. Gross revenue generated within the City includes monthly service charges paid by customers within the City, the full amount of charges for separately charged transmissions originating and received

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within the City, half the amount of separately charged transmissions that either originate or are received within the City, but are received or originate outside the City, any amounts received for rental of facilities within the right of way, and any other amounts received by the franchisee for services (including resale services) provided by the franchisee that use facilities within the right of way.

In the event that a transmission is sent or received by a mobile device (e.g., cellular phone), the mobile device shall be deemed to be in the jurisdiction where the bills for use of the device are sent, regardless of actual location at the time of the transmission.

- b. The franchise fee is compensation for use of rights of way and reimbursement of the City's cost of administering the program. The franchise fee is separate and distinct from any other legally authorized federal, state or local taxes or fees.
- c. The franchise fee is not subject to the property tax limitations of Article XI, sections 11(b) and 11(19) of the Oregon Constitution and is not a fee imposed on property or property owners by fact of ownership and is not a new or increased fee.
- d. The franchise fee shall be payable semi-annually on or before March 15 for the six month period ended December 31, and September 15 for the six month period ended June 30. The Grantee shall pay interest at the rate of one percent (1%) per month for any payment made after the due date. However, the first six month payment shall be prorated based on the effective date of this franchise.

### **SECTION 3. TERM**

The rights, privileges and franchise hereby granted shall commence when signed by both parties and continue to be in full force for a period of ten (10) years from the date this agreement becomes effective. Grantee may renew its franchise as provided by Tigard Municipal Code. This agreement shall be subject to any and all State or Federal laws and regulations.

### **SECTION 4. TRANSFER OR ASSIGNMENT**

Grantee shall not transfer or assign this franchise to any other party without the express written consent of the City, except that no prior written consent shall be required (1) if the transfer or assignment is to a parent, affiliate or subsidiary of Grantee or (2) if the assignment is to a commercial lending institution solely for security purposes in connection with a financing transaction and Grantee continues to be responsible for compliance with the Agreement. A transfer of ownership or control of a majority interest in the Grantee shall constitute a transfer of the franchise.

If the franchise is assigned or transferred, the assignee or transferee shall become responsible for all facilities of the existing transferee at the time of transfer. The City shall allow the transfer or

assignment if a transfer fee in an amount determined by resolution has been paid, the transferee or assignee meets all requirements imposed on franchisees, and the transferee or assignee agrees in writing to be bound by the franchise agreement and all applicable City Code and regulations as they exist at the time of transfer. A transfer or assignment of a franchise does not extend the term of the franchise.

## **SECTION 5. LEASING OF FACILITIES**

Grantee may lease capacity or bandwidth in its facilities within City rights of way only if it provides City with the name and business address of lessee.

## **SECTION 6. SERVICE TO CITY**

If City contracts for the use of Grantee's services, Grantee agrees to charge its most favorable rate offered to customers in the Portland local calling area buying similar services and volumes only in Oregon under the same terms and conditions.

## **SECTION 7. INSURANCE**

- a. Grantee shall provide and keep in force public liability insurance, with a thirty (30) day cancellation clause, with a combined single limit of three (3) million dollars, which shall be evidenced by a certificate of insurance filed with the City Recorder at City of Tigard, 13125 SW Hall Blvd., Tigard, OR 97223. The City shall be named as an additional insured on the policy to the extent of Grantee's insurable indemnity obligations under this franchise agreement. The insurance shall indemnify and hold the City harmless against liability or damage which may arise or occur from any claim resulting from the Grantee's operation under this agreement. In addition, the policy shall provide for the defense of the City for any such claims.
- b. In lieu of the third-party public liability insurance policy required by subsection a of this section, Grantee may provide and keep in force self-insurance in an amount at least equal to the limits identified in the preceding paragraph. The Grantee hereby further agrees to cover the City as a co-insured under this self-insurance program. The Grantee shall indemnify, defend and hold harmless the City through its self-insurance program against any and all claims, actions and suits (including attorney fees and costs) arising out of or resulting from Grantee's activities. The Grantee shall provide proof of self-insurance to the City before this agreement shall take effect.

## **SECTION 8. DEFENSE, INDEMNITY AND HOLD HARMLESS**

Grantee shall defend, indemnify and hold harmless the City and its officers, employees, agents and representatives from and against any and all damages, losses, and expenses, including reasonable

attorney fees and costs of suit or defense, arising out of or resulting from the negligent, careless, or wrongful acts, omissions, failure to act or other misconduct of the Grantee or its affiliates, officers, employees, agents, contractors, subcontractors or lessees in the construction, operation, maintenance, repair, or removal of its telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed, or prohibited by this agreement or by Tigard Municipal Code Chapter 5.14.

Grantee shall defend at its own cost the City and its officers, employees, agents and representatives from and against any and all claims alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failure to act or other misconduct of the Grantee or its affiliates, officers, employees, agents, contractors, subcontractors or lessees in the construction, operation, maintenance, repair, or removal of its telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed, or prohibited by this agreement or by Tigard Municipal Code Chapter 5.14.

#### **SECTION 9.            DAMAGE TO GRANTEE'S FACILITIES**

The City shall not be liable for any damage to or loss of any telecommunications facility as a result or in connection with any work by or for the City or for any consequential damages or losses resulting from such work unless the damage or loss is the direct and proximate result of willful, intentionally tortious, gross negligence, or malicious acts by the City.

#### **SECTION 10.          PERFORMANCE SURETY**

The Grantee shall provide a performance bond reasonably acceptable to the City as security for the full and complete performance of this agreement, to cover any costs, expenses, damages or loss the City pays or incurs because of any failure attributable of the Grantee to comply with the codes, ordinances, rules, regulations or permits of the City. The bond shall be in an amount sufficient to pay for the removal of all of Grantee's facilities within the right of way.

Prior to installing new telecommunications facilities in any right of way, the Grantee shall provide a performance bond or other surety acceptable to the City in an amount equal to at least 110% of the estimated costs of construction of the new facilities within the rights of way. The surety shall remain in force until 60 days after substantial completion, including restoration of public rights of way and other property, as determined by the City. The surety shall guarantee timely completion, construction in compliance with applicable plans, permits, codes and standards, proper location, restoration of public rights of way and other property, and timely payment and satisfaction of all claims, demands or liens for labor, material or services.

#### **SECTION 11.          NOTICE**

All notices and approvals required under this agreement shall be in writing. The Grantee shall provide the City with the name, position and phone number of Grantee staff that can be contacted for administration of this Agreement and for contact with construction-related questions and comments.

Such notices and approval shall be directed to the City as follows:

City Engineer, City of Tigard  
13125 SW Hall Blvd.  
Tigard, OR. 97223  
(503) 639-4171

and to Grantee as follows:

Time Warner Telecom of Oregon LLC  
Attn: Tina Davis, V.P. & Deputy General Counsel  
10475 Park Meadows Drive  
Littleton, CO 80124

With a Copy to:

Time Warner Telecom of Oregon LLC  
Brian Thomas, V.P. Regulatory – North West  
520 Southwest Sixth Avenue, Suite 300  
Portland, OR 97204

## **SECTION 12.        AUDIT**

- a.     Within ten (10) business days of a written request from the City, Grantee shall furnish the City:
  1.     Information sufficient to demonstrate that Grantee is in compliance with this agreement and Tigard Municipal Code Chapter 5.14.
  2.     Access to all books, records, maps and other documents maintained by Grantee with respect to its facilities in City rights of way so that the City may perform an audit. Grantee shall provide access to City within the Portland, Oregon metropolitan area.
- b.     If the City's audit shows that Grantee has underpaid the franchisee fee by five percent (5%) or more in any one year, Grantee shall reimburse City for the cost of the audit, and in addition to paying any underpayment, pay interest specified in Tigard Municipal Code Section 5.14.080(e) from the original due date. All payments shall be made within sixty (60) days of delivery to Grantee of the audit results.

- c. Grantee may designate portions of the information provided to the City under this section as confidential. The City shall maintain the confidentiality of such information to the extent permitted by Oregon Public Records Law (ORS 192.410 to 192.505). Confidentiality may be claimed under ORS 192.501(2) (trade secrets), ORS 192.501(19) (audits of telecommunications carriers), or other applicable exemptions from Public Records Law.

### **SECTION 13. LOCATION OF FACILITIES**

Grantee agrees to locate telecommunications facilities underground when the City requests in writing that the specific facility be placed underground. The City agrees that it will not require that any above ground facilities be placed underground unless all other telecommunications facilities within the same stretch of right of way are also required to be placed underground.

### **SECTION 14. INTERFERENCE WITH RIGHTS OF WAY**

Grantee shall locate and maintain all its telecommunications facilities so that they do not unreasonably interfere with the use of rights of way. Grantee agrees to complete all construction in rights of way so as to minimize disruption of the right of way and utility service and without interfering with other public and private property. Grantee agrees that it will not conduct any work in a right of way during a moratorium on right of way work, except as permitted by the City in case of an emergency.

### **SECTION 15. CONSTRUCTION PERMIT**

Grantee shall obtain a construction permit prior to engaging in any construction or installation activities within a City right of way and shall comply with all permit terms.

### **SECTION 16. FACILITIES**

Grantee shall install, construct, operate and maintain its telecommunications facilities in City rights of way in accordance with all applicable federal, state and local statutes, codes, ordinances, rules and regulations. Grantee agrees not to place any of its telecommunications facilities on or in any City pole, conduit, box or similar equipment without a separate agreement from the City authorizing such placement.

### **SECTION 17. AS BUILT DRAWINGS**

Grantee shall provide City with two complete sets of engineered plans in a form reasonably acceptable to the City showing the location of all its telecommunications facilities within rights of way after initial construction of its system and shall provide the City two updated complete sets of as-built plans at the end of each year whenever any change in location of Grantee's facilities occurs.

## **SECTION 18. RESTORATION OF RIGHTS OF WAY**

When Grantee, or those acting on its behalf, engages in work in or affecting a right of way or City property, the Grantee shall promptly, at its own expense, restore the right of way or other City property, to good order and condition unless otherwise directed by the City.

If weather or other conditions do not permit the complete restoration required by this section, the Grantee shall temporarily restore the affected rights of way or property. Such temporary restoration shall be at the Grantee's sole expense and the Grantee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding modification to the construction schedule may be subject to approval by the City.

If Grantee fails to restore rights of way or property to good order and condition, the City shall give Grantee written notice and provide the Grantee a reasonable period of time not exceeding thirty (30) days to restore the rights of way or property. If, after said notice, the Grantee fails to restore the rights of way or property to as good a condition as existed before the work was undertaken, the City shall cause such restoration to be made at the expense of the Grantee.

Grantee, or another person acting on its behalf, shall use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such rights of way or property.

All such work shall be done in strict compliance with the rules, regulations, ordinances or orders which may be adopted from time to time during the continuance of this franchise by the City Council or City Engineer or as may be otherwise provided by law. The City shall have the right to fix a reasonable time within which such repairs and restoration shall be completed and upon failure of such repairs and restoration being made by Grantee, City shall cause such repairs to be made at the expense of Grantee.

## **SECTION 19. CONSTRUCTION COORDINATION**

Grantee agrees to make a good faith effort to coordinate construction schedules with the City and other uses of City rights of way. Grantee's coordination efforts shall include, but not be limited to:



- a. Providing a work schedule to the City prior to January 1 for known construction work affecting City right of way for the year starting that date.
- b. Meeting with the City once per calendar year to schedule and coordinate work.
- c. Obeying orders of the City Engineer or designee relating to the coordination of construction projects.

## **SECTION 20. RELOCATION OR REMOVAL**

Grantee shall temporarily or permanently remove, relocate, change or alter the position of any telecommunications facility within the public right of way when requested to do so in writing by the City. The removal, relocation, change or alteration shall be at Grantee's expense when the removal, relocation, change or alteration is needed because of construction, repair, maintenance, or installation of public improvements or other operations of the City within the right of way or is otherwise in the public interest. In the event that the removal, relocation, change or alteration is needed to accommodate private development or other private use of the right of way, the developer or other private party requiring the action shall be responsible for the cost of removal, relocation, change or alteration. The Grantee shall be under no obligation to remove, relocate, change or alter its facilities to benefit a private party unless and until the private party pays a deposit for costs to the Grantee. The City shall specify in the written notice the amount of time for removal, relocation, change or alteration. In the event of emergency, the Grantee shall take action as needed to resolve the emergency, and the City may use any form of communication to direct the Grantee to take actions in an emergency to protect the public safety, health and welfare.

## **SECTION 21. DISCONTINUANCE OR REMOVAL OF TELECOMMUNICATIONS FACILITIES**

When Grantee plans to discontinue any telecommunications facility, the Grantee shall submit a plan for discontinuance to the City. The plan may provide for removal of discontinued facilities or for abandonment in place. The City Engineer shall review the plan and issue a written order to Grantee specifying which facilities are to be removed and which may be abandoned in place. The order shall establish a schedule for removal. The Grantee shall remain responsible for all facilities until they are removed.

Within thirty (30) days written notice to do so from the City, the Grantee shall, at its own expense, remove unauthorized facilities and restore the right of way. A telecommunications facility that the City Engineer has approved to be abandoned in place is not an unauthorized telecommunications facility. A telecommunications system or facility is unauthorized under the following circumstances:

- a. The telecommunications system or facility is outside the scope of authority granted by this agreement.
- b. The system or facility has been abandoned and the City Engineer has not authorized abandonment in place.
- c. The facility is improperly constructed or installed or in a location not permitted by this agreement.

If Grantee fails to remove any facility when required to do so under this agreement, the City may remove the facility and the Grantee shall reimburse the City for the full cost of the removal and any administrative costs incurred by the City in removing the facility and obtaining reimbursement.

## **SECTION 22. TERMINATION**

The City may terminate this agreement for the reasons stated in Tigard Municipal Code Section 5.14.500, applying the standards set forth in Tigard Municipal Code Section 5.14.510. Prior to termination, the City shall provide the notice and opportunity to cure provided for in Tigard Municipal Code Section 5.14.520.

## **SECTION 23. EQUAL TERMS**

If at any time subsequent to the execution of this agreement, any other similarly situated provider of similar telecommunications services shall enter into an agreement with the City governing the use of public rights of way whose terms and conditions as a whole are more favorable to that provider than are the terms of this agreement to Grantee, then this agreement may, upon request of Grantee, be modified such that the terms and conditions as a whole as applicable to Grantee are just as favorable as the terms and conditions of the other agreement as a whole are to the other telecommunications service provider.

## **SECTION 24. NATURAL DISASTER**

For purposes of this subsection, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto. If the Grantee is wholly or partially unable to carry out its obligations under this agreement as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this agreement shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this agreement.

**SECTION 25. COMPLIANCE WITH LAWS AND REGULATIONS**

Both parties reserve the right to seek a change, amendment, or modification to this agreement to conform to any applicable state or federal judicial or administrative ruling, state or federal statute, and or state or federal codes, standards, or regulations as may hereafter be enacted, adopted or promulgated.

**SECTION 26. SEVERABILITY**

If any section, sentence, clause or phrase of this agreement should be held to be invalid or unconstitutional by a court of competent jurisdiction, the parties shall negotiate changes to the agreement to the extent necessary to make it valid and enforceable.

**SECTION 27. CAPTIONS**

Captions are intended to facilitate reading and reference to the sections of this agreement. Captions may be used as a reference aid in interpreting the agreement but shall not be interpreted to be inconsistent with or to alter the written terms stated in the text.

**SECTION 28. SEPARATE COUNTERPARTS**

This agreement may be executed in separate counterparts, each of which when so executed shall be deemed to be an original. Such counterparts shall, together, constitute and be one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this agreement this 27<sup>th</sup> day of August, 2002.

CITY OF TIGARD  
OREGON, a Municipal Corporation

By: James E. Griffith  
Mayor James Griffith

ATTEST: Catherine Wheatley

Catherine Wheatley, City Recorder  
Date: August 27, 2002

GRANTEE:  
TIME WARNER TELECOM OF OREGON LLC  
By: Time Warner Telecom Holdings Inc.,  
Its sole member

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_